

STATE OF MICHIGAN
COURT OF APPEALS

FADI ABDUL-ARIM MARKABANI,

Plaintiff-Appellant,

v

HUSSAIN JALIEL AL-REKABI,

Defendant-Appellee.

UNPUBLISHED

May 29, 2014

No. 313741

Wayne Circuit Court

LC No. 12-000419-NI

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the order of the trial court granting defendant's motion to dismiss plaintiff's cause of action. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff filed a complaint on January 10, 2012, alleging that he sustained injuries arising out of an automobile accident that occurred on or about May 11, 2009. Plaintiff previously had filed suit against defendant, arising out of the same incident, in 2010 and 2011; the two prior suits were dismissed without prejudice, either by stipulation or for non-service. Plaintiff alleged that defendant was negligent in causing the injuries; however, plaintiff did not specify specifically how he had been injured. On April 25, 2012, defendant filed an answer to plaintiff's complaint and affirmative defenses, denying the allegations as untrue.

Defendant served plaintiff with interrogatories, requests for production of documents, and authorizations for the release of medical records, all of which went unanswered. On July 5, 2012, defendant filed a motion for sanctions for plaintiff's failure to provide discovery answers, alleging that he had served interrogatories upon plaintiff on April 23, 2012, and that as of the date of the motion, plaintiff failed to answer or respond. The interrogatories were more than two months overdue. See MCR 2.309 and MCR 2.310.

On July 20, 2012, the trial court entered a stipulated order regarding defendant's motion. The order provided:

Plaintiff will provide full and complete, signed answers to Interrogatories and responses to Request for Production of Documents as well as supply signed authorizations for release of all medical treatment records requested by defense

counsel's copy service and for all treatment providers with which Plaintiff sought treatment before and after the accident within twenty-one (21) days from the date of entry of this Order.

On August 20, 2012, defendant filed a motion to dismiss plaintiff's cause of action. Defendant contended that plaintiff failed to comply with the July 20, 2012 stipulated order, which required him to provide the above-mentioned documents to defendant by August 10, 2012. Defendant argued that he had received no information concerning the facts of the accident, the injuries allegedly sustained by plaintiff, and records from the facilities at which plaintiff had treated. Defendant requested the trial court to dismiss plaintiff's cause of action pursuant to MCR 2.313(B)(2)(c).

On August 31, 2012, the trial court heard defendant's motion. The trial court noted that plaintiff did not file a response to defendant's motion. Plaintiff's counsel claimed that he filed it late on August 30, 2012.¹ The trial court and plaintiff's counsel had the following exchange:

The Court: Well, why haven't you -- why hasn't your client complied with my order?

Mr. Anthony (Plaintiff's Counsel): I've been trying to contact the client. We've sent multiple voice mails [sic]. We've sent letters. I request that we do a reasonable amount of time and then if that -- if we can't get the discovery to him, then we can dismiss the case without prejudice.

The Court: I'm granting the order. I'm dismissing the case without prejudice.

The trial court subsequently entered a written order dismissing plaintiff's complaint without prejudice.

On September 20, 2012, plaintiff filed a motion for reconsideration. Plaintiff noted that his counsel failed to mention at the motion hearing that dismissal would be a complete bar on recovery because the three year statute of limitations had run. Plaintiff attached to his motion partial answers to defendant's interrogatories. Plaintiff requested that the trial court grant his motion for reconsideration and enter an order denying defendant's motion dismiss or, in the alternative, grant a lesser sanction.

On September 24, 2012, the trial court denied plaintiff's motion for reconsideration pursuant to MCR 2.119(F)(3). On November 19, 2012, the trial court entered an order setting aside its September 24, 2012 order (which apparently had not been served upon plaintiff) and properly entered a new order denying plaintiff's motion for reconsideration. This appeal followed.

¹ This Court's review of the lower court file leads us to conclude that plaintiff did not file a response to defendant's motion.

II. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision whether to impose discovery sanctions. *KBD & Assoc, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 677; 816 NW2d 464 (2012). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

III. ANALYSIS

Plaintiff argues that the trial court abused its discretion in granting defendant's motion to dismiss his cause of action for failing to comply with the July 20, 2012 order. Specifically, that the trial court failed to evaluate other sanction options on the record and to consider several factors in evaluating whether to dismiss the case. We disagree, and conclude that dismissal was an appropriate sanction in this case.

MCR 2.313(B)(2) provides that if a party fails to obey an order to provide discovery, the trial court may order such sanctions that are just, including: an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting the party from introducing designated matters into evidence; an order striking pleadings, staying further proceedings until the order is obeyed, dismissing the action, or rendering a default judgment; or an order treating as a contempt of court for the party's failure to obey an order. "[T]he court's chosen discovery sanction must be proportionate and just." *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 662; 819 NW2d 28 (2011) (internal quotation marks omitted). "Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." "The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it." *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). Severe sanctions are appropriate when a "party flagrantly and wantonly refuses to facilitate discovery," but "not when the failure to comply with a discovery request is accidental or involuntary." *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled on other grounds *Dimmitt & Owens Fin Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008).

In deciding whether to impose the sanction of dismissal, the trial court should consider:

(1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Vicencio v Ramirez*, 211 Mich App 501, 507; 536 NW2d 280 (1995) citing *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

These factors are not exclusive. *Vicencio*, 211 Mich App at 507.

Here, the record indicates that plaintiff, although stipulating that he would provide full and complete discovery responses and medical authorizations, had failed to provide *any*

discovery by the time of the motion hearing, including even signing authorizations for defendant to obtain medical records. Plaintiff's counsel had no explanation for these failures, and indicated that his attempts to contact the plaintiff had been ignored. No attempts to cure the defect had been made by the time of the motion hearing—plaintiff's attorney merely stated that he had *hoped* to provide answers to defendant by the motion hearing, but that he “put too much faith into that.” Thus, the record supports the conclusion, under the *Vicencio* factors listed above, that the violation was “wilful,” as plaintiff ignored numerous communications from his own attorney concerning an obligation of which he was certainly aware. Additionally, defendant was substantially prejudiced, as his ability to defend the case against him was hampered by a lack of even the most basic knowledge of what injuries plaintiff claimed to have incurred more than three years before. Finally, no significant attempt on the part of plaintiff had been made to cure the defect despite his counsel's expressions of hope and faith. Plaintiff attached as an exhibit to his motion for reconsideration his untimely answers to defendant's interrogatories. Yet, even these answers were not completed in full and did not include responses to requests for production of documents, or signed authorizations for all medical treatment records, and for all treatment providers, as required by the July 20, 2012 stipulated order.

In *Vicencio*, we found that the trial court's dismissal of the plaintiff's claim for failure to attend a settlement conference constituted an abuse of discretion. *Vicencio*, 211 Mich App at 507. We specifically noted that there was no evidence that the plaintiff's absence was wilful, and the defendant as not prejudiced by the plaintiff's absence. *Id.* Here, by contrast, we conclude that plaintiff's conduct was wilful, and that defendant was prejudiced as a result. We therefore find *Vicencio* distinguishable from the instant case, and affirm the trial court's dismissal of plaintiff's cause of action. Although the trial court could have addressed the *Vicencio* factors more fully on the record, we find no abuse of discretion under the circumstances presented.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Henry William Saad

/s/ Mark T. Boonstra